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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1975

ELLEN L. RAWSON, a/k/a
ELLEN L. MERRILL,
Petitioner,

vs. No. 75-1886

ROBERT H. WILBEE, as father and
next friend of BRUCE R. WILBEE,
a minor, and ROBERT H. WILBEE,
Individually,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1975

ELLEN L. RAWSON, a/k/a
ELLEN L. MERRILL,
Petitioner,

vs. No. 75-1336

ROBERT H. WILBEE, as father and
next friend of BRUCE R. WILBEE,
a minor, and ROBERT H. WILBEE,
Individually,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondents, ROBERT H. WILBEE, as father and next friend of BRUCE R. WILBEE, a minor, and ROBERT H. WILBEE, Individually, pray that this Court deny petitioner ELLEN L. RAWSON's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the Judgment and Opinion entered in these proceedings on August 7, 1975.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit followed applicable substantive law of the State of New Mexico regarding:

A. The effect of a statutory violation by a minor bicyclist, and

B. The quantum of proof required to permit a trial court to instruct a jury on the contributory negligence of the parent of a minor child.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Supreme Court of the State of New Mexico Order No. 8,000, Miscellaneous (Appendix B).

2. §21-1-1(51), *New Mexico Statutes Annotated, 1953 Compilation*, as amended, provides:

"(c) Use. Whenever New Mexico Uniform Jury Instructions (U.J.I.) prepared by the New Mexico Supreme Court Committee on Uniform Jury Instructions and approved by the Supreme Court for publication contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the U.J.I. instruction shall be used unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper, and the trial court so finds and states of record its reasons.

"(d) Certain Instructions Not To Be Given. When in U.J.I. it is stated that no instructions should be given on any particular subject matter, such direction shall be followed unless under the facts or circumstances of the particular case an instruction on the subject should be given, and the trial court so finds and states of record its reasons."

STATEMENT

Petitioner's STATEMENT fails to comply with Supreme Court Rule 40 in that it contains considerable argument. Respondents will adhere strictly to the requirements of the rule and will only include herein what is necessary to correct any inaccuracies or omissions in the STATEMENT of petitioner.

Petitioner requested New Mexico Uniform Jury Instruction 11.1, which reads in part as follows:

> "If you find from the evidence that the minor plaintiff conducted himself in violation of any of the above statutes, you are instructed that such conduct constituted negligence as a matter of law."

It is important to note that the "Directions for Use" pertaining to U.J.I. 11.1 charge that:

> "This instruction ordinarily has no application to a violation of a statute or ordinance by a child."

The court modified U.J.I. 11.1 and instructed the jury as follows:

> "If you find from the evidence that Bruce Wilbee violated any one of these statutes, you are instructed that such conduct does not constitute negligence as a matter of law, but such evidence may be considered in determining whether Bruce Wilbee exercised the standard of care required of a minor."

This instruction was preceded by New Mexico Uniform Jury Instruction 12.5, which reads as follows:

> "A child is not necessarily held to the same standard of conduct as an adult. By the term 'ordinary care' with respect to a minor, I mean that degree of care which a reasonably careful child of the age, mental capacity, and experience of Bruce Wilbee would use

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under circumstances similar to those shown by the evidence."

The "Directions for Use" following U.J.I. 12.5 contains the following language:

> "The word 'child' refers to a minor, seven years of age or over. This instruction should be used only in those cases when the minor is of such development that there is a genuine question for the jury that the conduct of the minor should be governed by a rule different from that applied to an adult."

In its decision, the Court of Appeals for the Tenth Circuit, commenting on the evidence in the record, stated:

> "As to the contributory negligence of the plaintiff seven-year-old, it does not appear from the record, as the defendant contends, that the evidence conclusively established his guilt of contributory negligence." (Appendix A)

ARGUMENT

Writs are matters of grace and will be granted only where there are special and important reasons therefor. *Durham vs. U.S.*, 401 U.S. 481, 28 L.Ed.2d 200, 91 S.Ct. 858 (1971); *Wade vs. Mayo*, 334 U.S. 672, 92 L.Ed. 1647, 68 S.Ct. 1270 (1948); *Deputy vs. DuPont*, 308 U.S. 48, 84 L.Ed. 416, 60 S.Ct. 363 (1940). The jurisdiction given to the Supreme Court to issue writs of certiorari must be exercised sparingly and with caution. *American Construction Co. vs. Jacksonville, T.K. & W. Railway Company*, 148 U.S. 372, 37 L.Ed. 486, 13 S.Ct. 758 (1893). Generally, the writ will issue to a court of appeals only in cases involving questions of importance which, in the public interest, should be decided by this Court. Needless to say, the writ will not issue merely to afford another hearing to the party defeated in the court of

appeals. *Magnum Import Co. vs. Coty*, 262 U.S. 159, 67 L.Ed. 922, 43 S.Ct. 531 (1923). Moreover, this Court has emphasized that certiorari will not be utilized merely to review the evidence or inferences drawn from the evidence. *General Talking Pictures Corporation vs. Western Electric Company*, 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1937).

Petitioner maintains that the Court of Appeals for the Tenth Circuit ignored New Mexico law and substituted its own view of the common law, contrary to the doctrine pronounced in *Erie Railroad Company vs. Tompkins*, 304 U.S. 34, 82 L.Ed. 1188, 58 S.Ct. 817 (1938). A review of the opinion of that court, however, immediately exposes the inaccuracy of petitioner's assertions. (Appendix A) In its opinion, the Court of Appeals for the Tenth Circuit stated as follows:

> "New Mexico law governs the issues of negligence of a minor child. We do not find a statute which covers this, but there are cogent rulings of the New Mexico Supreme Court considering the question."

Not only did the court rely upon New Mexico decisions bearing on the question but it also relied upon the New Mexico Uniform Jury Instructions which are required to be given under New Mexico law. (Appendix B and Section 21-1-1(51), *New Mexico Statutes Annotated, 1953 Compilation*, as amended) Specifically, the court referred to U.J.I. 12.5 which defines ordinary care of a child. The court found this instruction, and the Directions for Use, to be an articulation of the basic principle that a child of tender years is not held to the same standard of care as an adult. (See Appendix D)

The trial court properly instructed the jury on the standard of care required of a child. Moreover, the instruction requested by petitioner, which was refused by the trial

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court, was contrary to New Mexico Uniform Jury Instruction 12.5 and, further, contrary to the Directions for Use of U.J.I. 11.1 which state that such an instruction has no application to a violation of a statute or ordinance by a child. (Appendix C)

The only case authority in New Mexico where a child is held to the same standard of care as an adult is *Adams vs. Lopez*, 75 N.M. 503, 407 P.2d 50 (1965). But *Adams* deals with a sixteen-year-old boy operating a *motor scooter* which, by statutory definition, is a motor vehicle. That this distinction was persuasive to the court is reflected by that portion of its opinion which states as follows:

> "We have carefully considered the statutes of this state permitting the licensing of minors to operate motor vehicles and conclude that they do not provide different standards for minors and adults."

Clearly, the New Mexico Supreme Court found authority in the statutes to extend the adult standard of care to minors operating *motor vehicles*. It has not, however, extended the same standard of care for adults to minor children operating *bicycles*. And, as stated by the Court of Appeals for the Tenth Circuit, this is a "better reasoned viewpoint"; and it finds ample support elsewhere. *Herrell vs. Pimsler*, 307 F.Supp. 1166 (D.D.C. 1969); *Blakeman vs. Gopp*, Wyo., 364 P.2d 986 (1961); *Daun vs. Komax* 56 Cal.2d 647, 365 P.2d 407, 16 Cal. Rptr. 351 (1961); *Blashfield, Automobile Law & Practice*, §151.60; *Restatement of Torts, 2d*, §283.

While petitioner cites some New Mexico cases, not one of these supports petitioner's position. Indeed, the cases cited either uphold the Court of Appeals for the Tenth Circuit or are clearly distinguishable and of no effect.

Finally, petitioner also claims error in the trial court's having refused to instruct the jury on the issue of contribu-

tory negligence of the injured child's father. But petitioner failed to show the Court of Appeals any evidence in the record to warrant the giving of the tendered instruction. As the Court of Appeals properly stated, "Defendant's contention that the father was guilty of negligence in failing to control his child is patently lacking in merit." And petitioner is well aware that under New Mexico law, if contributory negligence is not shown by the evidence, or cannot be inferred therefrom, the giving of an instruction on contributory negligence is reversible error. *Bolen vs. Rio Rancho Estates*, 81 N.M. 307, 466 P.2d 873 (Ct. App. 1970).

CONCLUSION

It is clear from the record that the Tenth Circuit Court of Appeals followed substantive New Mexico law in affirming the Judgment of the trial court. Accordingly, this Court should summarily deny the Petition for Writ of Certiorari.

Respectfully submitted,

USSERY, BURCIAGA & PARRISH

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APPENDIX A

Filed Aug. 7, 1975

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1784

ROBERT H. WILBEE, as father and next friend of BRUCE R. WILBEE, a minor, and ROBERT H. WILBEE, individually, *Plaintiffs-Appellees,* v. ELLEN L. RAWSON, a/k/a ELLEN L. MERRILL, *Defendant-Appellant.*	))))))))	Appeal from the United States District Court for the District of New Mexico (D.C. No. 74-188)

Juan G. Burciaga of Ussery, Burciaga & Parrish, Albuquerque, New Mexico, for Plaintiffs-Appellees.

Eugene E. Klecan of Klecan & Roach, P.A., Albuquerque, New Mexico, for Defendant-Appellant.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges:

DOYLE, Circuit Judge:

This is a diversity case in which at trial the plaintiffs were awarded a verdict for injuries suffered by the minor plaintiff, Bruce Wilbee, who was struck by an automobile

while riding his bicycle. The collision occurred at an intersection in a residential area of Las Cruces, New Mexico. The plaintiff-appellee was making a left turn when the defendant-appellant, who was speeding, struck him causing injuries which resulted in a jury award of $22,244.08 damages.[1]

The main issue is whether the seven-year-old plaintiff-appellee could be held guilty of negligence per se. The trial court in its charge to the jury said that if the boy was found to have violated traffic regulations, his conduct would not be considered negligence per se but could be considered by the jury in determining whether he had met the standards of care required of a minor child by law.

Other issues are raised. These include:

1. Whether the trial court erred in allowing plaintiffs' expert to testify as to the speed of defendant inasmuch as the expert was unable to explain the formulas he used to determine her speed.

2. Whether the court should have submitted to the jury the issue whether the parent was guilty of negligence in failing to properly supervise the child.

3. Whether the court erred in receiving a transcript of a recording, notwithstanding that the recording itself (the best evidence) was available. The transcript was read to the jury.

A corollary point to the negligence per se issue outlined above is that the trial court should have directed a verdict for the defendant because the minor plaintiff was not, so it is argued, in compliance with the relevant statutory provisions.

We disagree with the defendant's arguments and conclude that the judgment of the district court should be affrmed.

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[1] Bruce's father sued both on behalf of the child, and on his own behalf for medical expenses.

I.

New Mexico law governs the issue of negligence of a minor child. We do not find a statute which covers this, but there are cogent rulings of the New Mexico Supreme Court considering the question. *See* Larimer v. City of Clovis, 83 N.M. 610, 495 P.2d 788 (Ct. App. 1972); Marrujo v. Martinez, 65 N.M. 166, 334 P.2d 548 (1959). *See, also,* New Mexico Uniform Jury Instructions, U.J.I. 12.5 and comment.

It is fundamental that a child of tender years, and this boy was seven, is not held to the same standard as an adult. He is held to that degree of care which a reasonably careful child of the age, mental capacity, and experience of the child involved would use under circumstances similar to those shown by the evidence. *See* U.J.I. 12.5; *see, also,* Zamora v. J. Korber & Co., 59 N.M. 33, 278 P.2d 569 (1954); Marrujo v. Martinez, *supra.* One recognized variation holds a minor operating a motor vehicle to an adult standard and holds the minor responsible under the doctrine of negligence per se. *See* Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965). The reason for this is that driving a motor vehicle is an activity sufficiently fraught with hazard so that it is fair to require the minor to conduct himself in accordance with the standards required of an adult.

The New Mexico Uniform Jury Instructions furnish a guide that states that "ordinarily (the instruction on negligence per se) has no application to a violation of a statute or ordinance by a child."[2] It cites Adams v. Lopez, *supra.*

The courts in other states are not uniformly in accord with the New Mexico viewpoint. *See* Leonard v. Bratcher, 258 Md. 186, 265 A.2d 246 (Ct. App. 1970) (a 14-year-old held guilty of negligence per se); *but see* Daun x. Truax, 56 Cal. 2d 647, 365 P.2d 407, 16 Cal. Rptr. 351 (1961). It was held in this latter case that the negligence per se rule is basically inconsistent with the doctrine generally applied to children which allows the jury to consider the age and capacity of the

[2] Comment to U.J.I. 11.1.

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child. *See, also,* Herrell v. Pimsler, 307 F. Supp. 1166 (D.D.C. 1969), wherein the court refused to instruct that violation of a traffic rule by an 11-year-old was negligence per se. *See, also,* Restatement of Torts Second § 283, which provides:

> Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

The comment is enlightening and in accord with our discussion. Part c distinguishes the problem of special adult activity such as driving a vehicle.

In summary, then, the trial court's instruction allowing the jury to consider the violation of the statute as evidence of the child's negligence followed a New Mexico decision and the better reasoned viewpoint. Its refusal to instruct that any violation of the statute by this seven-year-old child constituted negligence per se was not error. As to the contributory negligence of the plaintiff seven-year-old, it does not appear from the record, as the defendant contends, that the evidence conclusively established his guilt of contributory negligence. While it does appear that he made a left turn sooner than he might have in light of N.M.S.A. 1953 §§ 64-18-21 and 64-18-28, nevertheless, it was a jury question as to whether the boy's conduct was negligent and was the proximate cause of his injury.

The defendant would have us hold that the presence of the bicycle in the wrong lane conclusively established negligence and proximate cause. He cites a number of automobile cases in support of his argument.[3] But none of these deal with the special problem presented at bar. There is a vast difference between the operation of a bicycle and the driving

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[3] Pavlos v. Albuquerque National Bank, 82 N.M. 759, 487 P.2d 187 (Ct. App. 1971); Paddock v. Schuelke, 81 N.M. 759, 473 P.2d 373 (Ct. App. 1970); Bolt v. Davis, 70 N.M. 449, 374 P.2d 648 (1962); Martinez v. Scott, 70 N.M. 354, 374 P.2d 117 (1962); Hartford Fire Ins. Co. v. Horne, 65 N.M. 440, 338 P.2d 1067 (1959).

of a car. The bicycle is held to less rigid standards. We hold then that the trial court was not in error in refusing to direct a verdict for the defendant.

II.

The defendant's contention that the *father* was guilty of negligence in failing to control his child is patently lacking in merit. The evidence of the boy's father was that he had allowed the child to ride in the street with some restrictions. This decision did not disclose negligence or contributory negligence on his part. The court was therefore correct in its refusal to submit this issue to the jury.

III.

We do not see error in the reception by the court of the transcript of defendant's statement given to the insurance company rather than the original recording. Plaintiffs' counsel obtained a recording and had a transcript made. The trial court heard the recording and made modifications in the transcript. It then allowed the plaintiffs to read a portion of the transcript to the jury.

It is not claimed that the transcript was inaccurate but, rather, that it should not have been received in view of the availability of the recording. It is true that ordinarily the existence of the original document, for example, precludes the admissibility of secondary evidence. *See* Federal Rules of Evidence, Rules 1002 and 1004. We view this, however, as a discretionary matter, and although it does not appear from the record as to why the court did it, we fail to see that any prejudice resulted from the use of the transcript.

IV.

We finally consider whether the trial court erred in allowing the police officer, Mr. Evans, to give expert testi-

mony on the speed of the automobile. The witness had worked as a police officer from 1959 to 1964. From 1964 to 1969, he had worked for the New Mexico State Police. From 1969 onward, he was an accident investigator. He was shown to have attended accident investigator's school and to have taught and written on accident investigation. While the defendant does not dispute his qualifications on accident reconstruction, he does maintain that it was error to allow him to testify as to the speed. The witness measured the skid marks and determined a "coefficient of friction" which is a measure of the resistance of the highway, and then applied a formula which determined speed by multiplying the square root of distance of skid mark times friction by a constant of 5.5. It is lack of training of the officer in physics and mathematics which is the basis of defendant's objections.[4] A most extensive and careful cross-examination by defendant as to the basic knowledge of the witness was carried out. It appeared that he had written a paper on the use and derivation of this formula. He also said that it was an accepted formula. Following this exhaustive questioning, the court allowed him to testify that the defendant's minimum speed was 35½ miles per hour, whereas the speed limit was 25 miles per hour.

The law is clear that the trial court has discretion in the matter of determining the qualifications of an expert. *See* Phelps Dodge Corp. v. Atchison, T. & S.F. Co., 400 F.2d 20 (10th Cir. 1968); Grain Dealers Mutual Ins. Co. v. Farmers Union Coop. Elevator and Shipping Ass'n., 377 F.2d 672 (10th Cir. 1967); Tome Land & Improvement Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972); Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App.) *cert. denied*, 80 N.M. 608, 458 P.2d 860 (1969); Alford v. Drum, 68 N.M. 298, 361 P.2d 451

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[4] It should be noted that defendant called Mr. Butler, the investigating officer, to testify as to speed. Butler had a two year associate's degree in electrical engineering, had been on the police force since 1973, and had received on-the-job training in determining speed from skid marks. Defendant's attorney maintained at the trial that Butler was qualified to testify as to speed because "he had done it on previous occasions and had studied it." Butler simply used a chart to determine speed. He did not explain how the chart was derived.

(1961). In effect, the defendant maintains that the witness' explanations were inadequate as a matter of law. We disagree. His explanations were rational and sufficient, and we see no need for a showing that he has a profound understanding of the underlying principles of mathematics and physics.

In our opinion the trial court did not commit error and the judgment should be affiirmed. It is so ordered.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

IN THE MATTER OF)
RULES OF PLEADING,) No. 8000 MISCELLANEOUS
PRACTICE AND)
PROCEDURE.)

ORDER APPROVING USE OF UNIFORM JURY INSTRUCTIONS

WHEREAS, the Supreme Court of New Mexico, on the 29th day of January, 1962, entered an order having for its purpose the improvement of procedure applicable in connection with the preparation of jury instructions and the practice to be followed in instructing juries; and

WHEREAS, the New Mexico Supreme Court Advisory Committee on Uniform Jury Instructions was thereupon appointed to consider promulgation of uniform jury instructions for use in the District Courts of the State; and

WHEREAS, each of the members of the Committee has served diligently and faithfully with considerable personal sacrifice and loss, and is deserving of recognition and appreciation of the entire bar and of this Court; and

WHEREAS, the Committee has prepared and submitted to the Court proposed Uniform Jury Instructions, together with their comments and instructions for use; and

WHEREAS, this Court has this date entered its order providing for the use of the instructions so prepared when approved and published, and for non-use of instructions on certain subjects.

NOW, THEREFORE, IT IS ORDERED that the instructions prepared by the New Mexico Supreme Court Advisory Committee on Uniform Jury Instructions, together

with directions as to use or non-use of instructions on certain subjects, contained in a volume published by West Publishing Company and attached hereto, shall be in effect as New Mexico Uniform Jury Instructions (U.J.I.) and shall be used as provided in Rule 51 of Rules of Civil Procedure (Sec. 21-1-1 (51) N.M.S.A. 1953), in cases filed on and after September 1, 1966.

IT IS FURTHER ORDERED that the Committee shall continue in existence to prepare such additional instructions as it may conclude should be recommended to be incorporated, and to consider and recommend corrections and refinements, as required.

IT IS FURTHER ORDERED that Joseph E. Roehl, Esq., Chairman; John S. Catron, Esq., George T. Hannett, Esq., Henry A. Kiker, Jr., Esq., (Deceased), Honorable D. A. Macpherson, Jr., Don G. McCormick, Esq., Charles D. Olmsted, Esq., Honorable George L. Reese, Jr., Lynell G. Skarda, Esq., Lewis R. Sutin, Esq., and Honorable Joe W. Wood, being the members of said Committee who have served thereon, are each hereby recognized for the valuable duties performed, and are hereby extended the thanks and commendation of the State Bar of New Mexico and of this Court for their service and contribution.

DONE at Santa Fe, New Mexico, this 5th day of May, 1966.

s/ DAVID W. CARMODY
Chief Justice

s/ DAVID CHAVEZ, JR.
Justice

s/ M. E. NOBLE
Justice

s/ IRWIN S. MOISE
Justice

s/ J. C. COMPTON
Justice

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APPENDIX C

UJI 11.1

STATUTES AND ORDINANCES

VIOLATION OF STATUTE OR ORDINANCE

There was in force in the state (city) at the time of the occurrence in question a certain statute (ordinance) which provided that:

(Quote or paraphrase the applicable part of the statute or ordinance in question)

If you find from the evidence that the (defendant) conducted himself in violation of this statute (ordinance) you are instructed that such conduct constituted negligence as a matter of law.

DIRECTIONS FOR USE

The last paragraph of this instruction should be given only where there is no evidence to excuse the violation under the test shown in Instruction UJI 11.2. If there is such evidence then Instruction UJI 11.2 should be given rather than Instruction UJI 11.1.

Instruction UJI 11.1 should not be given in any case where the statute or ordinance in question was not enacted for the benefit or protection of the party or for the benefit or protection of a class of the public to which the party belongs who claims injury from the violation.

If the court feels under the circumstances of a particular case that the jury might possibly infer from the expression "negligence as a matter of" that this instruction eliminates the question of proximate cause, it would then be proper to give Instruction UJI 11.3.

This instruction ordinarily has no application to a violation of a statute or ordinance by a child. However, in cases where a standard of care is imposed by statute or ordinance

irrespective of age, the instruction would be applicable as in the "driver" cases. Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965).

If the issue of contributory negligence in the violation of a statute or ordinance is involved under which the defendant claims that the plaintiff violated an ordinance or statute, this instruction can be adapted for such use. In such a case the word "plaintiff" should be substituted for the word "defendant" and the word "contributory" should be inserted before the word "negligence".

COMMITTEE COMMENT

The violation of a statute which is enacted for the benefit or protection of the party claiming injury from the violator or for the benefit or protection of a class of the public to which such person is a member is negligence per se. Hayes v. Hagemier, 75 N.M. 70, 400 P.2d 945 (1965); Bouldin v. Sategna, 71 N.M. 329, 378 P.2d 370 (1963); Zamora v. J. Korber & Co., 59 N.M. 33, 278 P.2d 569 (1955). The same principle is applicable to the violation of an ordinance. Jackson v. Southwestern Public Service Co., 66 N.M. 458, 349 P.2d 1029 (1960).

A qualification of this rule to the effect that one may be excused from such violation if he sustains the burden of showing that he did what might reasonably be expected of a person of ordinary prudence acting under similar circumstances has been recognized by the New Mexico Supreme Court. See the first and last case above cited.

APPENDIX D

TORT LAW

UJI 12.5

ORDINARY OF CARE CHILD — DEFINITION

A child is not necessarily held to the same standard of conduct as an adult. By the term "ordinary care" with respect to a minor I mean that degree of care which a reasonably careful child of the age, mental capacity, and experience of the (plaintiff) (defendant) (decedent) would use under circumstances similar to those shown by the evidence.

DIRECTIONS FOR USE

The word "child" refers to a minor, seven years of age or over. This instruction should be used only in those cases when the minor is of such development that there is a genuine question for the jury that the conduct of the minor should be governed by a rule different than that applied to an adult. If the minor is of such age or development as to be governed by the standard of care of an adult then this instruction should not be used. The court should rule as a matter of law before this instruction is given as to whether the minor in question is to be treated as an adult or a child.

This instruction should not be given in the case of a minor driving a motor vehicle who is within the age of a licensed driver. In such instance the minor is held to the standard of care imposed by law and, therefore, is governed by the adult definition of ordinary care. Nielsen v. Brown, 232 Or. 426, 374 P.2d 896 (1962); Illinois Pattern Jury Instruction 10.05; Adams v. Lopez, 75 N.M. 503, 407 P.2d 50.

COMMITTEE COMMENT

Some states adopt the common law rule that "ordinary care" for a minor begins at the age of seven and that one under seven is incapable of contributory negligence. How-

ever, in the case of Marrujo v. Martinez, 65 N.M. 166, 334 P.2d 548 (1959), a child seven years of age was found contributorily negligent by the trial court.

If the minor is of such age and development as to be governed by the standard of care of a mature person then this instruction would be a false issue for the jury. The primary question must be decided by the court. Archuleta v. Jacobs, 43 N.M. 425, 94 P.2d 706 (1939); Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955). See also Gallegos v. McKee, 69 N.M. 443, 367 P.2d 934 (1962), where the case of Thompson v. Anderman is interpreted. See also Martinez v. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964).

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